TABLE OF CONTENTS

Page

The Shortage and Its Relationship to Past Overcharges 2

The Prematurity Argument 8

The Precedents Relied on by the Solicitor General 10

Conclusion 13

TABLE OF AUTHORITIES

CASES:

Chandeleur Pipeline Co., Op. 560 FPC 20 (1969), rev'd sub nom. Public Service Commission of New York v. F.P.C., D.C. Cir. No. 23446, June 29, 1970 7

Dolcin Corp. v. F.T.C., 219 F.2d 742 (D.C. Cir. 1954), cert. denied, 348 U.S. 981 12

F.P.C. v. Tennessee Gas Co., 371 U.S. 145 (1962) 6

Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1939) 11, 12

Inland Steel Co. v. U.S., 306 U.S. 153 (1939) 10, 11

I.C.C. v. Jersey City, 322 U.S. 503 (1944) 9

Ex parte Lincoln Gas & Electric Co., 256 U.S. 512 (1921) 11

Natural Gas Pipeline Co. v. F.P.C., 128 F.2d 481 (7th Cir. 1942) 10, 11

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 4

Phillips Petroleum Co., Op. 338, 24 FPC 537 (1960) 8-9

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 8

Public Service Commission of New York v. F.P.C., D.C. Cir. No. 23446, June 29, 1970 7

United Gas Improvement Co. v. F.P.C., 290 F.2d 133 (5th Cir. 1961) 3

Wisconsin v. F.P.C., 373 U.S. 294 (1963) 9

OTHER:

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. § § 717-717w 8, 9

Senate Judiciary Subcommittee on Antitrust and Monopoly, Hearing of March 3, 1970 3

IN THE

Supreme Court of the United States

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

AMERADA HESS CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

In our petition for certiorari, we urged this Court to grant certiorari and summarily reverse the court of appeals' unprecedented grant of relief to the gas-producing industry in the absence of any finding of legal injury resulting from the Federal Power Commission's area rate order. Briefs in opposition have been filed by the industry and, belatedly, by the Federal Power Commission, which, in a marked change of position, now appears to argue against enforcement of its September 1968 rate order.

Significantly, none of the briefs in opposition contends that this case is unimportant or that the legal issues presented are insubstantial. Rather, the briefs rely on two interrelated arguments. First, they contend that there is "a potential crisis in the adequacy of supplies of natural gas for millions of consumers" (FPC Br. 14), and that this potential crisis warrants the court of appeals' "qualified affirmance" (FPC Br. 17) under which the Commission is left free not only to adjust future rates upwards but also to forgive the $375,000,000 in *past* overcharges now due under the 1968 rate order. Second, they contend that since, after the further Commission proceedings authorized by the court of appeals, the Commission might adhere to its original holding and again direct that past overcharges be refunded, our petition for certiorari, seeking a final resolution of this ten-year-old proceeding, is premature. We here reply to these and other arguments raised by the briefs in opposition.

1. The Shortage and its Relationship to Past Overcharges.

Subsequent to the entry of the Commission's Southern Louisiana area rate order two years ago, the handful of major oil companies which control natural gas production[1] have failed to meet the requests of the interstate market for new supplies of natural gas. Whether the ensuing shortage is the result of a producer boycott designed to coerce higher prices,[2] whether it is the result of the long-continued

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[1] In Southern Louisiana, 11 major oil companies make 75% of the interstate sales.

[2] Gov. John McKeithen of Louisiana has charged the industry with creating a gas shortage by shutting in 1500 wells capable of production in the expectation of obtaining higher prices, see Fort Worth Star-Telegram, June 25, 1970. And, as noted *infra*, the Federal Trade Commission has recently directed its staff to determine whether there has been collusion by the industry to withhold natural gas from the market.

failure of the Department of the Interior to hold a major offshore Louisiana lease sale,[3] whether it is the result of an unanticipated surge in the industrial demand for natural gas, or whether it is, as the producers assert, the result of governmental price regulation is sharply disputed. Two things, however, are beyond dispute. First, the fact that producers have a supply that is or can be so restricted in relation to demand that, absent regulation, they would have the economic power to bargain for prices injurious to the public is, as Judge Tuttle has noted, "the only justification for giving the [Federal Power] Commission the duty to regulate prices"[4]; it can hardly, as the Commission now urges, furnish a basis for shirking that duty. While this would be true even if it were demonstrated that the shortage were real and not contrived,[5] it is significant that the Federal Trade Commission, on October 13, 1970, directed its staff to determine whether there had been "collusion or other unlawful conduct" by the oil industry to withhold natural gas from the market.[6]

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[3] R.W. Bybee, manager of exploration for Humble Oil & Refining Company, has recently stated (Houston Post, July 5, 1970):

> "The shortage of gas, which will cause serious problems either this winter or next, are problems which could have been lessened or solved by a large lease sale in the Western Louisiana offshore in 1965 or 1966."

[4] *United Gas Improvement Co. v. F.P.C.*, 290 F.2d 133 at 135 (5th Cir. 1961).

[5] That it may be impossible for the government or the public to determine whether such a shortage is the result of underlying economic forces or is deliberately contrived to influence government policy, see testimony of the Honorable George P. Shultz before the Senate Judiciary Subcommittee on Antitrust and Monopoly, March 3, 1970, quoted at page 19, note 7, of our Petition for Certiorari.

[6] The FTC instituted its investigation only after the FPC had declined requests to undertake a similar investigation.

Second, there is simply no rational basis for arguing, as the Commission, in complete contradiction to its position in its Southern Louisiana opinion and in the court of appeals, now argues (FPC Br. 15), that the current "potential crisis" could, much less should, be resolved by permitting the producers to retain forever the $375,000,000 in past overcharges now due the consumer.[7] Under the two-price system adopted by the Commission for area pricing and approved by this Court in *Permian*, 390 U.S. 747 (1968), the incentive for new supplies is found in the *new*-gas price. Thus, as the Commission repeatedly and correctly stated in its brief to the court of appeals in this case (Brief for Federal Power Commission, *Southern Louisiana Area Rate Cases*, Fifth Cir. No. 27492, pp. 14, 15, 21, 25-26, emphasis in original, footnotes omitted):

> "[A]s was made clear in *Permian*, the only price fixed by the Commission that can have any substantial effect on the development of *new* supplies is the price for gas-well gas not yet found, that is, the price for future sales of gas-well gas."
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> * * *
>
> "Nor is there merit to the producers' argument that they should be required neither to make refunds of excessive amounts previously collected nor to reduce excessive existing rates because this might impair the search for new gas supplies on the theory that the revenues received from all gas will determine the level of their exploratory effort."
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[7] To the extent that the Commission's determination that there is a "potential crisis" rests on the report of its staff, it should be noted that the staff report relies wholly on industry-supplied data as to gas reserves, which data the Commission and the industry have regarded as "confidential" and not subject to cross-examination. Nor does the staff report appear to give any meaningful consideration to the probably decisive impact of offshore federal lease sales on expansion of gas reserves.

> "The producers' argument that in order to alleviate the alleged gas shortage the Commission should fix the prices for all gas (including oil-well gas) above pre-existing prices totally ignores the fact, as found by the Commission and the courts in *Permian* and the Commission here, that the only prices fixed by the Commission that can have any substantial effect in the development of *new* supplies is the price of gas-well gas not yet found and committed to the interstate market."
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> * * *
>
> "The producers attempt . . . to avoid the impact of this economic reality on the ground that any reductions and refunds ordered will allegedly impair the search for additional gas supplies because the producers' source of funds for reinvestment would be less than if there were no reductions or refunds. As the Commission stated in denying rehearing (R. 309077), this claim, which is based on the invalid premise the producers must internally generate all investment funds, is essentially the same contention in favor of a single price for all gas previously made and rejected in *Permian*."

And, as the Commission's Solicitor advised the court below during oral argument (Transcript of argument of October 6, 1969, p. 140):

> "[T]he record makes it perfectly clear that . . . producers can get money from outside and they're not dependent on internal generation and they're certainly not dependent upon internal generation based on their gas revenues. An illustration is the recent investment in Alaska. Obviously, that $1 billion [paid for the acquisition of leases] didn't come from the oil and gas that was being produced in Alaska. The investment is made because it appears to be an attractive investment."

Furthermore, it must constantly be borne in mind that the $375,000,000 in past overcharges was collected by producers subject to the express requirement that it would be

refunded to the consumer if it was found to be in excess of the just and reasonable level by the Commission and if that determination were affirmed on appeal. That condition has now been met, and there is no longer any legitimate basis for continuing to deny to consumers restitution of what was wrongfully exacted from them. *F.P.C. v. Tennessee Gas Co.*, 371 U.S. 145 at 154 (1962).

In connection with the rate reductions ordered by the Commission's area rate opinion, the Commission's brief in this Court is seriously misleading in stating (FPC Br. 8) that the order provided that any amounts collected above the applicable area rates after October 1, 1968 "were to be subject to refund"; in fact, excessive rates were required to be reduced, but this requirement was stayed, pending appeal, pursuant to the direction of the court of appeals. Similarly, the statement (FPC Br. 9) that "the rates set by the Commission in [its opinion] have never been ordered into effect" is incorrect; their effectiveness was twice ordered, 40 FPC at 651, 41 FPC at 341-42, but was stayed by the action of the court below.

The Commission's concern (FPC Br. 15) that the refund requirement might have an adverse effect on "the ability of producers to provide the capital for exploration and development programs" and on "the number of competitors in the search for natural gas" is not only legally and logically unfounded but is wholly inconsistent with facts well known to the Commission. Almost 40% of the $375,000,000 in refunds is due from three companies The Superior Oil Company, with $60,000,000; The California Company, division of Chevron Oil Company,[8] with $42,000,000; and Shell Oil Company, with $37,000,000. Superior has, for many years, and while collecting its contract rates, been withdrawing from the Southern Louisiana production area; thus it has not been, and cannot be expected to be, a factor in making new Southern Louisiana reserves available to the

[8] A subsidiary of Standard Oil Company of California.

interstate market. Chevron, while active in offshore exploration, has been more interested in utilizing the reserves discovered as fuel in its own onshore oil refineries than in making such reserves available to the interstate market, see *Chandeleur Pipeline Co.*, Op. 560, 42 FPC 20 (1969), rev'd sub nom. *Public Service Commission of New York v. F.P.C.*, D.C. Cir. No. 23446, June 29, 1970, per Wilkey, J.; mandate enforced, per curiam order of October 12, 1970. Similarly, Shell Oil does not appear to have been a major factor in recent offshore Louisiana exploration. But even if it were assumed that these three companies would be "discouraged" from further exploration if they were required to refund the excess collections that they agreed to refund upon a showing of excessiveness, this would undercut neither the theory of the area-rate approach nor the probability of the discovery of adequate gas supplies: area pricing need not—indeed should not—encourage *every* producer, and if Superior or California or Shell were to withdraw from the market, their places could readily be filled by others. Significantly, the refund liability of the remaining majors, though sizable in absolute terms (Atlantic Richfield Company, $8.5 million; Getty Oil Company, $4.6 million; Gulf Oil Corporation, $7.5 million; Humble Oil & Refining Company,[9] $24.5 million; Mobil Oil Corporation, $6.5 million; Pan American Petroleum Corporation,[10] $8.5 million; Texaco Inc., $17.2 million; Union Oil Company of California, $17.0 million), actually represents, in each instance, less than ½ of 1% of the producer's 1969 gross revenues, and it is therefore difficult to credit the Commission's present speculation (FPC Br. 15) that the restitution of these sums might impair "the ability of the producers to provide the capital for exploration and development programs."

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[9] A subsidiary of Standard Oil Company of New Jersey.

[10] A subsidiary of Standard Oil Company (Indiana).

2. The Prematurity Argument

Both the Commission (FPC Br. 18) and the producers (see, e.g., Texaco Br. 9-12) contend that the instant petition is premature since there is a possibility that, following further proceedings before the Commission, the Commission might require that refund of past excesses be made. Even if that possibility were a live one—and as we show below it is not—this is hardly a case where the charge of prematurity can be taken seriously.[11] This case is now in its tenth year, and the Commission's determination rests on the most extensive record ever compiled in a Federal Power Commission proceeding. Surely as to all past periods, at least, finality is long overdue. In this regard it must be emphasized that the Commission order whose reversal the court of appeals' decision would permit, even in the absence of legal error, is the first major rate order for this crucial Southern Louisiana area in the entire 32-year history of the Natural Gas Act. For the first sixteen years under the Act, the producers escaped regulation because of the Commission's erroneous interpretation of the statute; that situation was rectified by this Court's 1954 *Phillips* decision. For the next six years, the FPC investigated the rates of the major producers, but when the first of these cases was ready for decision, the Commission, concluding that it would prefer to proceed on an area rate basis declined to fix rates. *Phillips Petroleum*

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[11] So, too, the Commission's footnote suggestion (FPC Br. 18 n. 9) that "uncertainty caused by the petitions for writs of certiorari may well inhibit the Commission from expediting its regulatory process in this and related cases to establish stability in rate levels in Southern Louisiana" is logical in form but lacking in substance. Stability as to past periods can be achieved most promptly by the summary and unqualified affirmance of the Commission's order as requested by our petition for certiorari. The only "certainty" created by denial of certiorari, on the other hand, is the certainty of still more hearings, the certainty of still more delay in ultimate disposition, and the certainty that the same issues presented by our petition for certiorari will, after another two or three years, again be before this Court.

Co., Op. 338, 24 FPC 537 (1960), and this Court, accepting the Commission's representations that area rates would be made effective shortly, affirmed, *Wisconsin v. F.P.C.*, 373 U.S. 294 at 313-14 (1963), but cf. 373 U.S. at 328 (dissenting opinion).[12] Despite our repeated requests for expedition (R. 34355-57, 304328, 304376, 304643, 305384, 305431), uniformly opposed by the producers and almost uniformly denied by the Commission, this case was not decided until September 1968.[13] And, despite our opposition, the court below granted producer requests for a stay of the Commission's order pending appeal. Under these circumstances, there is no warrant for postponing still further the relief to which the consumer is entitled under the Act.

The scenario for future developments in this case, if certiorari is denied, has already been written, and it includes no possibility of refunds other than through yet another round of appeals. The settlement negotiations spoken of so glowingly in the Texaco and California Company briefs have been held and concluded: at these conferences—held on an off-the-record basis with the press and public barred—the producing industry, speaking with one voice, warned that gas shortages would continue unless all parties agreed not only to sharply higher prices for both new and old gas but to a complete forgiveness of the $375,000,000 in refunds due for past overcharges as well. Since the refunds, though made in the first instance to the pipelines, would have to be paid over by the pipelines to distributors and by distributors to the ultimate consumers, the pipelines and distri-

[12] Speaking for the four dissenting members of this Court, Mr. Justice Clark warned:

> "The result is additional delay, delay and delay until the inevitable day when there is no more gas to regulate."

[13] The producers' repeated reference to the alleged staleness of the record is not only legally irrelevant, see *I.C.C. v. Jersey City*, 322 U.S. 503 (1944), but comes with poor grace: if the record is stale, it is only because the producers were successful in their efforts to delay decision.

butors ultimately agreed to forgive refunds. The producer proposal is opposed by petitioner and other consumer interests; but the "settlement"—which accurately reflects the relative bargaining strength of the negotiating parties and demonstrates why regulation, and not negotiation, is required to protect the public interest—is nevertheless in the process of being submitted to the Commission for its approval. Since the Commission during the past year has uniformly approved industry-sponsored offers of settlement notwithstanding consumer objection (see, e.g., App. A to California Co. Brief in Opposition), it may be reasonably anticipated that the Southern Louisiana "settlement" will be approved, completely forgiving the $375,000,000 in consumer refunds, and leaving petitioner and others with the obligation to seek relief through further judicial proceedings.

3. The Precedents Relied on by the Solicitor General

The FPC's brief in opposition rather cavalierly disposes of the serious legal issues presented by our petition for certiorari with the assertion (Br. 17) that, in the FPC's view, the court acted within the scope of Section 19(b) of the Natural Gas Act, citing three cases in support of this assertion. The three cases are relevant, but they are all contrary to the FPC's position.

In *Natural Gas Pipeline Co. v. F.P.C.*, 128 F.2d 481 (7th Cir. 1942), an early case under the Natural Gas Act, the court of appeals had, as in the present case, stayed the effectiveness of an FPC order reducing rates pending appeal. The Commission's opinion was subseqently sustained, and the question before the court was as to its power to dispose of the fund created as the result of the stay. The court held that its power over the fund was exclusive (ousting jurisdiction of a federal district court where consumers had sued for refund of overcharges) and that its exercise of jurisdiction was mandatory. Relying on this Court's decisions in *Inland Steel Co. v. U.S.*, 306 U.S. 153 at 158

(1939),[14] and *Ex parte Lincoln Gas & Electric Co.*, 256 U.S. 512 at 517 (1921),[15] the court of appeals held, 128 F.2d at 486, that where a fund has been accumulated pursuant to a stay of a rate reduction order and the order is affirmed, the court's equitable duty is

> "to exercise jurisdiction to enforce restitution, and so far as possible, to correct what has been wrongfully done. . . . The performance of this duty is not discretionary; it is obligatory, mandatory."

Accordingly, the court in *Natural* ordered what we contend the court of appeals should have ordered here—refund of the accumulated funds to the consumers.

Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1939), the second case cited by the FPC, differs substantially from the present case, and the differences are instructive. There, the NLRB had petitioned the Sixth Circuit to enforce a Board order against the company; before the enforcement proceeding had been heard on the merits, the Board asked for a remand to consider the effect of an intervening decision of this Court. The company then filed an appeal and opposed remand, and, when remand was granted, appealed to this Court. In affirming, this Court noted that there had been no decision on the merits (305 U.S. at 373), and that both sides agreed that the Board's order should be vacated. Thus, the company's objection was merely "that instead of setting aside the Board's findings and order, the court has allowed the Board itself to set them aside" (305 U.S. at 374-75). The Court then concluded: "The contention on

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[14] In *Inland Steel*, this Court held:

> "When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the court promptly to allocate the fund to its lawful owner."

[15] In *Lincoln Gas & Electric*, the Court held that where a stay had been granted pending appeal, "the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers."

that ground is without substance. In either event the findings and order are vacated."

The contrast to the present case is striking: here, there has been a decision on the merits, affirming the Commission's order; all parties are *not* agreed that the Commission's order should be vacated;[16] and the court of appeals here did not purport either to vacate the order or to remand the proceeding. *Ford Motor* thus offers little solace to the FPC position.

The most inapposite of the Commission's citations, however, is *Dolcin Corp. v. F.T.C.*, 219 F.2d 742 (D.C. Cir. 1954), cert. denied, 348 U.S. 981. In *Dolcin*, the court found that an FTC cease-and-desist order against Dolcin was valid, though requiring some modification, and affirmed the order as modified. In addition, the court concluded that Dolcin's motion for leave to adduce additional evidence should be granted, since the evidence, a new medical study, would be material to the validity of the cease-and-desist order. The court held, however, that since "it is now nearing five years since this case arose," the public interest would be best served by permitting the Commission's order to become final "as though this were a simple affirmance" notwithstanding the requirement that the additional evidence be taken, 219 F.2d at 751. As the court explained in denying rehearing (219 F.2d at 752):

> "[T]he policy of the statute is served by enforcement of the order during the interim. The mere possibility that petitioners may persuade the Commission to modify its order in some particular should not deprive the public of protection during the period of reconsideration."

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[16] Indeed, even our opponents concede that "affirmance of the Commission's decision was required" (Humble Br. 16).

CONCLUSION

The petition for certiorari herein raises a substantial legal issue as to the power of a court of appeals to permit reopening of a Commission order found to be without legal error. The legal issue is given heightened public importance by the fact that denial of certiorari will indefinitely delay, if not totally defeat, the right of consumers to restitution of $375,000,000 in overcharges. But looming above the legal and practical issues is the economic one—does the petroleum industry have the raw economic power to render nugatory, through a constriction in gas supply, 32 years of efforts by Congress, by the Commission, and by the courts to regulate the industry's rates for the sale of natural gas in interstate commerce.

The petition for certiorari should be granted, the court of appeals' order on rehearing should be summarily vacated, and the Commission's rate order insofar as it directs refunds and reductions should be sustained.

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